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Supreme Court of the United States
OCTOBER TERM, 1946

No. 1156

VIRGINIA YOUNG STOTT, MAY YOUNG LUBBEN, AND ELIZABETH JANSING,

Petitioners,

v.

TIDE WATER ASSOCIATED OIL COMPANY AND SEABOARD OIL COMPANY OF DELAWARE,

Respondents.

RESPONDENTS' BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The statement of the case in the petition for writ of certiorari does not contain all of the facts necessary to a proper understanding of the issues involved, and a more complete statement appears in the opinion by the Circuit Court of Appeals. (R. 528.)

Respondents had drilled a well on each of petitioners' tracts of land. (R. 174-175.) The trial court found that respondents had produced from petitioners' lands all the oil and all the gas, including oil and distillate separated therefrom, for which there was a market, and that this gas, oil, and distillate had been sold and the royalties due thereon had been paid to the petitioners. (Finding of Fact 15, R. 39-40.)

Prior to commencement of recycling operations by respondents, two other operators had initiated and were carrying on recycling operations in the field. (Finding of Fact 10, R. 38.) As stated in the opinion of the Circuit Court of Appeals, the evidence is uncontradicted that withdrawal of wet gas and injection of dry gas by these two operators would have resulted in the replacement of wet gas by dry gas under a portion of petitioners' lands within six or seven years from 1939, and would have withdrawn all of the wet gas from the entire reservoir and replaced it with dry gas within about ten years from 1939. (R. 159-160, 165, 294.)

It was found by the trial court that it was not feasible or practical or in accordance with prudent operations for respondents to conduct separate recycling operations on each of petitioners' tracts of land. (Finding of Fact 14, R. 39.) Accordingly, recycling operations could not be conducted on petitioners' lands unless they were unitized. (R. 141-142.)

The trial court further found that respondents offered to unitize petitioners' lands and have them participate in recycling operations in the same manner and on the same basis as other landowners and royalty owners in the field and to pay them the prevailing royalty, but petitioners refused to unitize and participate in these operations. (Finding of Fact 13, R. 39; Finding of Fact 21, R. 49.)

Recycling operations by respondents had been authorized by an order entered by the Railroad Commission of Texas. (R. 426-428.)

The trial court found that the production of wet gas from the reservoir and the reinjection of dry gas into the reservoir had resulted in the replacement of wet gas by dry gas under portions of petitioners' lands. (Finding of Fact 22, R. 49.)

ARGUMENT

REPLY TO POINT A IN PETITIONERS' BRIEF

The decision by the Circuit Court of Appeals is not in conflict with applicable local decisions or with any probable decision of the Supreme Court of Texas. On the contrary, the court has decided this case on established principles of Texas law.

This is a suit for damages for alleged breach of implied covenants in oil and gas leases. Under Texas decisions, performance by the lessee of the implied covenants is measured by the standard of what might reasonably be expected of a prudent operator under the same or similar circumstances.

> "A lessee's obligations in the performance of the implied covenants as to development, operation, equipping, and marketing are measured by the same rule, reasonable diligence, or what an ordinarily prudent and diligent operator would do." *Rhoads Drilling Co. v. Allred*, 123 Tex. 229, 70 S. W. (2d) 576.

When, as found by the court in this case, the lessee has done all that reasonably could have been expected of a prudent operator under the existing facts and circumstances, there has been no breach of any implied covenant.

The rule is not different where the lessee also owns leases on adjoining land. The facts and holding of a typical Texas case are stated in the opinion by the Circuit Court of Ap-

peals, *Hutchins v. Humble Oil & Refining Co.*, 161 S. W. (2d) 571 (Tex. Civ. App.), error refused by Sup. Ct. Tex. (R. 533.)

There is no basis for the contention that the present decision is or may be in conflict with any Texas decision, past, present, or future.

REPLY TO POINT B IN PETITIONERS' BRIEF

Humphreys Oil Co. v. Tatum, 26 F. (2d) 882, certiorari denied, 278 U. S. 633, is not in conflict with the present decision or with Texas decisions. It appears in the *Humphreys* decision, and is restated by the Circuit Court of Appeals in the present case, that Humphreys Oil Company was held liable because its failure to drill additional wells on Tatum's land was a failure to use reasonable care in good faith to protect Tatum from damage caused by Humphreys' operations on adjoining premises. This is the application of the prudent operator rule.

Applicable Texas law is stated by the Supreme Court of Texas in *Freeport Sulphur Co. v. American Sulphur Royalty Co.*, 117 Tex. 439, 6 S. W. (2d) 1039:

> "The correct rule is announced in *Brewster v. Lanyon Zinc Co.* (C. C. A.), 140 F. 801, wherein Mr. Justice Van Devanter (then circuit judge) said:
>
> " 'Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required'."

As held by the Circuit Court of Appeals, respondents did use reasonable care in good faith to protect petitioners' land. Petitioners correctly state that the Circuit Court of

Appeals found "there was no breach by respondents of any implied covenant not to injure petitioners' lands." (Petition for writ of certiorari, page 4.) There can be no probable different result in the Supreme Court of Texas. No Texas court has held, nor will one ever hold, a lessee liable to a lessor for damages in a suit for breach of covenant where no breach of any covenant has occurred.

REPLY TO POINT C IN PETITIONERS' BRIEF

It is not necessary for this Honorable Court to take jurisdiction of this cause to outline a rule of conduct for lessors and lessees. The prudent operator rule stated by Justice Van Devanter as early as 1905 has been used, adopted, approved, and applied by the courts many, many times. It is the established law in Texas without exception. Sanctioned by Texas courts and by courts, both state and federal, in many other states since the early days of the oil and gas industry, the rule has become part and parcel of the working knowledge of all persons interested in the conduct of the oil and gas business. Elaboration of the rule is not required. It has proved adequate to meet the varying conditions that have arisen in the oil and gas industry, and no new rule is now needed to supersede it. In each case it is for a court to apply the rule to the facts as established and found. There is no reason to believe that liability or nonliability for damages for alleged breach of implied covenants of an oil and gas lease cannot continue to be satisfactorily determined by application of the prudent operator rule.

REPLY TO POINT D IN PETITIONERS' BRIEF

Compulsory unitization is not an issue in this case. At the time respondents' recycling operations were commenced, recycling operations by other operators were in progress, which, according to the undisputed evidence, would have captured all of the wet gas content in the common reservoir. Respondents were producing, and continued to produce, from petitioners' lands all of the petroleum products for which there was a market, and paid petitioners royalties totaling $14,964.23 prior to the trial of this cause. (R. 461.) The only means by which additional condensate could be recovered from petitioners' lands, and the only means to avert loss of condensate under respondents' leases, including the lands of petitioners, was by recycling operations. Recycling operations could not be conducted on petitioners' lands unless they were unitized. Respondents offered to unitize petitioners' tracts and to have them participate in the recycling operations. Petitioners declined to unitize and to participate in the recycling operations. Respondents continued to conduct normal lease operations on petitioners' lands and proceeded with their recycling operations on their other leases.

Under these circumstances, the Circuit Court of Appeals correctly held that petitioners could not refuse to coöperate with respondents for their mutual protection against loss of a common property right and at the same time assert and demand damages. That the co-owners owe to each other the duty to coöperate where loss or serious injury to the common property is threatened, is recognized by the

Texas courts. *United North & South Oil Co. v. Meredith*, 272 S. W. 124 (Tex. Com. App.).

It is not correct to say that petitioners had no choice. Individual lease operations were carried on on each of petitioners' tracts of land. Respondents offered petitioners an additional operation and one which was necessary for the protection of their mutual interests. Petitioners declined. They exercised their judgment in favor of individual lease operations, which choice respondents respected by continuing to produce and market oil and gas from petitioners' tracts and to pay petitioners the royalties due thereon.

Petitioners express apprehension that an "entirely one-sided" agreement with "whatever terms may suit" the lessee may be forced upon a lessor. There is no statement or suggestion in the opinion of the Circuit Court of Appeals that such a proposal by a lessee would be held "reasonable care in good faith to protect (lessor) from damages," which was the standard by which the lessee's conduct was measured in *Humphreys Oil Co. v. Tatum, supra.* The opinion is exactly to the contrary. With respect to the proposals in the present case, the Circuit Court of Appeals has found:

> "The record supports the trial court in this finding of fact[1] and there is no evidence to show that the prevailing plan was unfair to the royalty owners in general or to appellees in particular." (R. 534.)

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[1] "At all times involved in this suit, Tide Water-Seaboard were ready and willing and undertook to unitize the Jansing, Stott, and Lubben tracts and to have them participate in recycling operations carried on by Tide Water-Seaboard in the field in the same manner and on the same basis as other landowners and royalty owners in the field. Jansing, Stott, and Lubben declined to unitize and participate in these operations." (Finding of Fact 13, R. 39.)

and

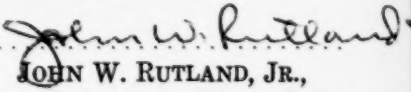
> "As the plan offered by the appellants to the appellees, for unitization of their tracts and participation in the recycling operations, was reasonable and fair in all respects, the appellants amply fulfilled any duty of fair dealing which may have been imposed upon them by the lessor-lessee relationship." (R. 535.)

CONCLUSION

There is no conflict between the decision of the Circuit Court of Appeals in this case and applicable local decisions, and this case has been correctly decided under established principles of Texas law. It is respectfully submitted that the petition for writ of certiorari should be denied.

TIDE WATER ASSOCIATED OIL COMPANY,

SEABOARD OIL COMPANY OF DELAWARE,

By 

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